No. 12047

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EARLE C. ANTHONY, INC.,

Appellant,

vs.

KENNETH E. MORRISON and THE VOICE OF THE ORANGE EMPIRE, INC., LTD.,

Appellees.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

I

Reply to Appellees' Contention That "the Complaint Fails to State a Cause of Action." [Reply Br. pp. 3-11.)

Appellees divide their argument as to this topic under two separate headings, the first a contention that KFI had no civil right to broadcast from the courtroom and the second that it had no right to use the Judge's chambers or KVOE's private wire.

In our opening brief we developed at some length the question of the interest involved (App. Op. Br. pp. 8-20), and of the duty of a State when it makes available privi-

leges to its citizens to insure that such privileges are granted to its citizens upon a basis of equality of right.

Appellees reply to these cases in part IV of their brief (Reply Br. pp. 17-18) and dispose of these cases for the most part by the simple expedient of classification and the statement, without exposition, that they are not in point. In Part I of their brief, for the proposition that no civil right or privilege protected by the constitution is here involved, appellees cite two lines of cases to establish their contention. One set of cases deals with the right to practice law in State courts and the other deals with the enforcement of public duty.

Cases of the first class are *Mitchell v. Greenough,* 100 F. 2d 184 (Reply Br. pp. 3-4), and *Emmons v. Smitt,* 149 F. 2d 869. (Reply Br. p. 4.)

The rule that the right to practice law in the State court is not a privilege granted by the Federal Constitution and laws was established initially by the case of *Bradwell v. Illinois,* 83 U. S. 130, 21 L. Ed. 442, a case which held that woman who was denied the right to practice law in Illinois had no redress under the "privileges and immunities" clause of the Constitution.

A similar ruling with reference to a statute of Virginia is to be found in *In re Lockwood,* 154 U. S. 116, 38 L. Ed. 929. The *Lockwood* case emphasizes that the issue arises under the privilege and immunities clause of the Constitution and was not enlarged by the 14th Amendment. The question of denial of equal protection is not discussed in either case.

The two cases cited by appellees, the *Mitchell* and the *Emmons* cases (Reply Br. pp. 3-4) follow these rulings.

With these cases we have no quarrel. They recognize the authority of a State to prescribe reasonable rules and regulations for admission to the bar of the State without supervision by the federal government. We see no analogy between such cases and the present case. We submit, however, that if there were an arbitrary discrimination in the application of the rules and regulations, then a federal right would arise for which redress could be found in a federal court. The distinction is not the question of the duty of a State to admit persons to practice law in the State, but is of its duty when it does determine to admit persons to the practice of law to see that such admission is on the basis of an equality of right. Had appellees cited cases approving arbitrary discrimination between applicants similarly situated we believe that then and only then would they have presented cases that are in point on the issue here before the court.

Illustrative of the discussion is the comparatively recent decision of Judge Learned Hand in the case of *Burt v. City of New York,* 156 F. 2d 791 (C. C. A. 2nd). Burt brought an action under the Civil Rights Act against the City of New York, the "Board of Standards and Appeals," the "Department of Housing and Building," the "Commissioner of Buildings," the "Borough Superintendent," and the Chief Engineer and two examiners of the Building Department. Apparently, Burt's contentions were that these defendants in many instances deliberately misinterpreted and abused their statutory authority by denying applications which he, a "registered architect," had submitted to these bodies, or by imposing unlawful conditions on his applications. He charged that these defendants selected him for these oppressive measures,

while unconditionally approving the applications of other architects similarly situated. He asserted that he was the victim of a "purposeful discrimination." Judge Hand ruled that Burt had stated a cause of action. It will be noted that in the complaint on file here a wilful, intentional, invidious and purposeful discrimination was charged repeatedly (note Paragraphs VIII, IX, XIII of the First Cause of Action, and Paragraphs II and IV of appellants' Second Cause of Action, and Paragraph X which sets out specific acts of the Judge evidencing malice (App. Op. Br. pp. 6-12).)

It is, of course, obvious that it is purely a state function for a building department of a city to determine what standards of construction are to be adhered to in that city. It is equally the function of the state to set standards for admission to the bar. So long as such standards are reasonably prescribed and enforced, no Federal question arises. But when there is found an intentional discrimination as to persons in the same class, then a cause of action arises under the Civil Rights Act, which we understand is the express ruling of the *Burt* case. (The *Burt* case is, after all, simply an application of the rule of *Yick Wo v. Hopkins,* 118 U. S. 356, 30 L. Ed. 220. See, also *Alston v. School Board of City of Norfolk,* 112 F. 2d 992 (C. C. A. 4th).) And in the instant case, we submit that a cause of action arises under the Civil Rights Act when a State court opens its courtroom to radio broadcasting to the citizens of the State, if there is arbitrary discrimination between persons of the same class as to the right to use such privilege.

Counsel's second type of case deals with the question of whether a private right is created for a public wrong,

citing as its principal authority *Lamar Pub. Co. v. Hoag,* 131 Pac. 400. (Reply Br. p. 5.) These cases hold that where a statute is intended for the benefit of the public, though certain members of the public may incidentally benefit thereby, redress for breach of the statute is by public prosecution of some kind and not by private action maintained by the person or persons incidentally benefited. KFI is not here attempting to force Judge Morrison as a judge to perform any duties he owes to the public at large; rather KFI has alleged a purposeful, arbitrary and intentional discrimination and denial to KFI of the right to enter his courtroom for the purpose of radio broadcasting, after he had opened his courtroom to such broadcasts. In short, the line of authorities cited by counsel deals with the steps to be taken for redress against the sins of omission. Here KFI is seeking relief from a deliberate act of commission.

As a practical matter, the public wrong cases if held applicable to a civil rights action would effect a nullification of the Act. Any action involving a public official brought under the Civil Rights Act could be avoided by the defense that even if the official had unlawfully discriminated no remedy was available to the victim of the discrimination. The sole redress would be public prosecution brought by public authorities. Thus in the case of *Westminster School District of Orange County v. Mendez,* 161 F. 2d 774 (C. C. A. 9th) . . . where this Court ruled that children of Mexican descent could not

be barred from public schools used by white children and where such restriction was found contrary to California law . . . instead of granting relief as was done, under the rule urged by appellees this Court would have been required to dismiss the case for the reason that the Attorney General of the State of California possessed the power to bring a proceedings against the School District for dereliction of duty.

By way of a general summary of the right here involved we would like to emphasize the following points.

Equal protection of the laws applies to privileges and rights given as well as serving as a shield against attempts to take away such rights. Any right that comes within the protection of the equal protection clause of the 14th Amendment can be made actionable under a proper set of facts in a suit brought under the Civil Rights Act. That is to say, the Civil Rights Act does not enlarge or take away the protection granted by the 14th Amendment. Its sole purpose is to create a cause of action to enforce the amendment where state action is involved. In short, there are not two standards for the determination of a denial of equal protection to be met in a suit under the Civil Rights Act.

Any case that is authority for a denial of equal protection is, as a consequence, an authority for a Civil Rights case for the purpose of determining the nature of the right involved, and for determining whether it can be made the subject matter of a suit in a Federal Court.

We submit that such a cause of action was here clearly stated and cite as authorities the cases presented in our opening brief.

Little comment would seem necessary to dispose of appellee's proposition that KFI had no right to the use of Judge Morrison's chambers or to the KVOE private wire. We have not contended it has. It was suggested in our opening brief (App. Op. Br. pp. 18-19), that a judge, who opens his courtroom to broadcasting, may impose such restrictions on the exercise of the right as will reasonably be calculated to insure proper court decorum, so long as in doing so there is no discrimination among those persons who desire to avail themselves of the right. By way of one example we suggested that a judge might condition his approval on a pooling plan where all would take from one set of microphones in the courtroom. There are, of course, other methods. By this suggestion we did not contend that KVOE was required to turn over its property to KFI or to anyone else. This is a straw man of appellee's creation, not ours.

The allegations of our complaint with reference to KMPC are for the purpose of showing further intentional and deliberate discrimination against KFI by Judge Morrison. We have no criticism as such of the judge's permission to KMPC to use his chambers. From an evidentiary standpoint we do believe that this solicitude on the part of Judge Morrison to insure the success of KMPC's broadcast is but another facet in the judge's discrimination as to KFI.

II.

Reply to Appellee's Proposition That "It Appears From the Complaint That There Is No Federal Question Involved." (Reply Br. pp. 12-13.)

This proposition of appellees is but another approach to the general point, was there a denial of equal protection. The authorities cited are in point on the obvious rule that if a denial of equal protection is not alleged in the complaint, it is defective under the Civil Rights Act.

Appellees cite two cases in this portion of their brief as authority for the statement that the Civil Rights Statutes do not make Federal questions of every departure from State law. These cases are *Lane v. Chandler,* 124 F. 2d 785, and *United States v. Mozley,* 238 U. S. 383, and 59 L. Ed. 1355.

In the *Lane* case plaintiff sued on a theory of conspiracy to prevent him from having and holding employment under W.P.A. The Court pointed out that plaintiff sought no redress because the State of Minnesota discriminated against him or because its laws fail to afford him equal protection. It then pointed out that there is no absolute right under the laws of the United States to have or retain employment in the W.P.A. The Court then said that the case was a suit where certain persons, as individuals, are alleged to have conspired to injure plaintiff by individual and concerted action.

The Civil Rights Statute reads in part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . ." (8 U. S. C. A. 43.)

As the element of State action is not present in the *Lane* case, it involved a set of facts not analogous to the case at bar.

United States v. Mosley, 238 U. S. 383, 59 L. Ed. 1355, is favorable to appellees in the dissenting opinion only. The majority opinion written by Mr. Justice Holmes holds that a conspiracy of State election officials to omit the returns of certain precincts at an election for members of Congress from their counts and from their return to the State election board is indictable under a Statute making it a crime to conspire or injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured by him by the Constitution or laws of the United States.

Even assuming that we have failed in stating a cause of action, nevertheless, this case should not be dismissed for want of jurisdiction. If dismissed at all, it should be for failure to state a cause of action. We have endeavored to allege a cause of action within the Civil Rights Statute. Such a cause of action is within the jurisdiction of the District Court. If we fail so to allege it is not a failure for want of jurisdiction, but is rather a failure to state a cause of action under the Statute.

In our complaint we followed rather carefully the pleading approved by this Court in *Westminster School District of Orange County v. Mendez,* 161 F. 2d 774, and the requirements of a proper pleading of a Civil Rights case, as set forth in *Snowden v. Hughes,* 321 U. S. 1, 88 L. Ed. 497. Attention is also called to the pleading requirements of a Civil Rights Act case as set out by the United States Court of Appeals for the Second Circuit in *Burt v. City of New York,* 156 F. 2d 791, which case predicates its views on the rules ennunciated in the *Snowden* case. It is believed we have met the standards laid down in those decisions.

III.

Reply to Appellee's Contention That "Judges Are Exempt From Civil Suit." (Reply Br. pp. 14-16.)

This point was covered in our opening brief (App. Op. Br. pp. 25-29), and appellees raise no new cases in reply. Since the writing of that portion of the brief we have found two additional authorities recognizing the rule that a judge is not exempted from civil suit under the Civil Rights Act.

In *Burt v. City of New York,* 156 F. 2d 791, discussed *supra*, one of the points made was that appellant had not exhausted his remedies. It was stated that when the various boards turned down plaintiff's application he had a remedy of certiorari to the Supreme Court of the State of New York and that plaintiff had not pursued this remedy. The Circuit Court of Appeals agreed that such failure might bar an injunction in this case, but said (p. 793):

> "However that may be, clearly it is not an effective substitute for the damages which the plaintiff may have suffered from the subordinate officers whom he has made defendants, or from the Board itself. The risk of a recovery against them for these does on its face appear substantial; and indeed in Picking v. Pennsylvania R. Co., *supra* (3 Cir., 151 F. 2d 240), it was held that the 'Civil Rights Act' actually tolled the privilege of a judge."

In *Alesna v. Rice,* 74 Fed. Supp. 865 (Dist Ct. of Hawaii), the Court, following the *Picking's* case, held in a Civil Rights case that it was proper to include a Territorial Circuit Judge as a defendant.

IV.

Reply to Appellee's Contention That "Authorities Cited by Plaintiff Are Not in Point." (Reply Br. pp. 17-18.)

Every case listed in this portion of appellee's brief are cases cited in our opening brief presenting factual situations from which the court found that there was a denial of equal protection of the law. We submit that each case so cited is analogous as to the law, though the facts of course, differ.

Appellee dismisses these cases by classification and by the statement that they are not in point.

Hannegan v. Esquire, 327 U. S. 146, 90 L. Ed. 586, is dismissed as a simple case of censorship. It was all of that. But the Supreme Court pointed out that this censorship was accomplished as a result of a denial of equal protection. There is likewise censorship presented in this case, an even more vicious type than that of the *Hannegan* case. There the censorship resulted in freezing the dissemination of news. Here the censorship froze the news at its source.

The *Danskin* case, 28 Cal. 2d 536, is waived aside with the statement, unsupported by citation, that the Supreme Court has invalidated the decision. Presumably counsel are referring to the requirement of an affidavit as to political views. If that is their reference, the fact that the Supreme Court may have indicated in the labor field that a labor union may be required to file such an affidavit certainly in no wise questions the point for which the case was cited, namely, that when a state offers a privilege to its citizens it must do so on a non-discriminatory basis.

The *Classic* case (313 U. S. 299, 85 L. Ed. 1368), and the *Screws* case (325 U. S. 91, 89 L. Ed. 1495) were cited under a discussion of the meaning of the term "color of law" as used in the Civil Rights Act (App. Op. Br. p. 24), and they are, with *Westminster School District v. Mendez* (161 F. 2d 744), the leading cases on the question of color of law.

The *Westminster* case is dismissed by appellees with the statement that it was a case where a "District refused to permit a child of Mexican descent to attend a white school in admitted violation of a California Statute." (Reply Br. p. 18.) The fact that the *Westminster* case was brought under the Civil Rights Act and held that there had been a denial of equal protection of the law is overlooked by appellees.

International News Service v. Associated Press, 248 U. S. 215, 63 L. Ed. 211, was cited by KFI for the proposition that the occupation of gathering news is a property right which the Courts will protect. (App. Op. Br. pp. 20-21.) Appellees apparently concede this proposition. They believe the case to be interesting as an authority for KVOE having an exclusive right to its private wire, a proposition we have not questioned. (Reply Br. p. 18.)

The remainder of the cases considered by Appellee, some six in number, are waived aside by the simple expedient of stating that they involve discrimination because of race or color, hence can be of no value here. KFI is here before the Court charging defendants with discrimination. True a race question is not involved, but a discrimination question, the gravamen of denial of all equal protection cases is involved, and we submit that each such case presenting as it does a different aspect of discrimination is

authority for and in point with the case at bar, each holding that the courts of the United States stand ready under the Constitution to suppress discrimination wherever and in what disguise it is found to exist.

In conclusion we again submit that if any branch of the State is to be held to a high standard of fairness and impartiality, and where discrimination should be first rooted out, it should be in our judicial system. We respectfully urge this Court to rule that a good cause of action was here stated and within the jurisdiction of the Federal Court.

Respectfully submitted,

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